

ASSOCIATION OF LEGAL PROFESSIONALS (ALP)

May 26, 2011

Gina Donnelly
Office of Employee Relations
City of San Jose
200 E. Santa Clara St.
San Jose, CA 95113

**Re: 5/31/2011 Council Agenda Item No. 3.5
(City's Last Best and Final Offer to ALP)**

Dear Ms Donnelly:

ALP rejects the City's latest offer which the City identifies as being its "last, best and final" offer. The City also threatens to impose the terms and conditions of this offer on ALP at the May 31, 2011 Council meeting. The City's actions are improper and premature because we are **not** at impasse. The City has **not** completed negotiations of ALP's proposals.

We are copying this response to the City Council directly because you intimated in your May 25, 2011 letter to us that you would proceed directly to Council without input from our bargaining unit despite our indication on May 24 that we would have a timely response, and ALP's representation to Council on the morning of the 24th that ALP was still open to discussions with the City's bargaining team.

The City and ALP are not at impasse because ALP requested to meet and confer on the impacts of the layoffs in our bargaining unit if our unit would lose current members (rather than unfilled positions). But the City declared impasse on a Friday, and then on the following Tuesday announced layoffs from our bargaining unit. As a result, ALP discussed the City's layoff plans with the City's negotiating team and then offered proposals on reinstatement rights and waiver of the revolving door restrictions. The City indicated that it would respond to these proposals – but never has. The City effectively has refused to negotiate those provisions or any of the impacts of layoffs. Accordingly, the "last, best and final" offer is invalid.

Even assuming the latest offer from the City were proper and timely, it shows the City's continuing unwillingness to negotiate in good faith and reflects the heavy handed approach it has taken in the "negotiations." The latest offer contains two sub-proposals – an "A" and a "B" – both of which include the same reductions in compensation. However, sub-proposal "A" is a one-year contract with a complete take-away of sick leave payout and two ambiguous side letters dealing with future negotiations on retirement issues. Sub-proposal "B" is a two-year agreement with no sick leave take-away and an additional side letter to negotiate on the sick leave payout issue. Sub-proposal "A" is clearly intended to be so unpalatable as to result in ALP agreeing to sub-proposal "B." This is even more

obvious given the City's threat to impose sub-proposal "A" on ALP if ALP does not select sub-proposal "B."

Both parts of the latest offer are unacceptable. They restate the same proposal terms that the City has repeatedly made to ALP which would improperly affect the constitutionally protected vested rights of our members.

ALP has rejected the previous, similar City proposals for the following reasons:

- **Sick Leave Payout Takeaway:** This proposal would improperly take away the constitutionally protected vested rights of our members. At the beginning of "negotiations," the City proposed a complete takeaway of sick leave payout. During the "negotiations" the City never offered to provide the required comparable benefits to ALP members in exchange for the takeaway of this vested benefit (which is discussed further below). For that matter, the City has never even bothered to offer any kind of a proposal short of a complete takeaway or a side letter with unacceptably vague and one-sided language.
- **Sideletters:** As ALP stated during negotiations, the side letters regarding retirement changes are unreasonable and ambiguous. For months now, the City has insisted upon unchanging language in side letters, crafted in a manner that is unfair to ALP members. More specifically, the side letters create ambiguity on whether they would allow the City to unilaterally impose changes to the constitutionally protected retirement benefits of our members that the City would not otherwise be lawfully entitled to impose. Moreover, during the months of "negotiations," as noted later, the City has made many public statements about retirement reform but ***has never made a single proposal to ALP on retirement reform at the negotiations with OER (the "bargaining table") which is the only venue where City Council allows ALP to negotiate with the City.***

ALP has been advised by its counsel **not** to sign the one-sided side letters drafted by the City. Moreover, the City can not properly impose side letters on ALP which condition bargaining on an unlawful term. Nevertheless, during negotiations, ALP indicated a willingness to enter into reasonable side letters regarding future negotiations over retirement and sick leave payout issues. ALP has, and continues to be, willing to work with the City's negotiating team to develop side letter language that is balanced and fair, and that meets the interests of both parties. The City's latest offer seems to once again reflect the City's unwillingness to actually "negotiate."

We are also now thoroughly confused by the City's last, best, and final offer in that after presentation to our unit, the side letters are no longer recommended for Council unilateral imposition by the Office of Employee Relations. If the side letters will no longer be included, this action by the City

represents a major shift in the scope and focus of the negotiations, demonstrating that the parties are not at impasse and should be back at the negotiating table.

Neither the City Manager, nor the Mayor and City Council, have adequately informed the public about the legal constraints upon the City in the numerous public statements calling for changes to the pension rights of ALP members among others. To provide more public information and transparency on this issue, we refer to our prior letter of February 10, 2011 which can be found at the following link:

http://www.sanjoseca.gov/clerk/CommitteeAgenda/Rules/20110216/rules20110216_f.pdf.

The California Supreme Court has held that a public employee has a vested right to not merely preserve the pension benefits already earned, but also to continue to earn benefits under the terms previously promised through continued service. Legislature v. Eu (1991) 54 Cal.3d 492, 530. We also point to relevant portions of the Orange County case where that county was held to be acting unlawfully in a similar attempt to reduce the vested pension rights of its deputy sheriffs.¹

¹ This language may be found on Page 18 of the Orange County Sheriff's Opinion

"A. Vested pension rights

A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. (Betts v. Board of Administration (1978) 21 Cal.3d 859, 863.) Before retirement, the employee does not have — any absolute right to fixed or specific benefits, but only to a substantial or reasonable pension. (*Ibid.*) [P]ension laws are to be liberally construed to protect pensioners and their dependents from economic insecurity. [Citation.]

Unlike other terms of public employment, which are wholly a matter of statute, pension rights are obligations protected by the contract clause of the ***federal and state Constitutions***. [Citations.] (*emphasis added*).

As the Supreme Court notes, upon acceptance of public employment [one] acquire[s] a vested right to a pension based on the system then in effect.' [Citation.] (United Firefighters of Los Angeles City v. City of Los Angeles (1989) 210 Cal.App.3d 1095, 1102, quoting Miller v. State of California (1977) 18 Cal.3d 808, 817 (*Miller*)). Nevertheless, pension rights are not immutable. (*Miller, supra*, 18 Cal.3d at p. 816.) A government entity may make reasonable modifications and changes before the pension becomes payable. . . .'(*Ibid.*)

Any subsequent modification to vested pension rights must be reasonable based on the facts of each case, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' (*Ibid.*) The saving of public employer money is not an illicit purpose if changes in the pension program are accompanied by comparable new advantages to the employee.' (Board of Administration v. Wilson (1997) 52 Cal.App.4th 1109, 1145.) ***Therefore, —[a]n employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure.*** (*emphasis added*) (Betts v. Board of Administration, supra, 21 Cal. 3d at p. 866; United Firefighters of Los Angeles City v. City of Los Angeles, supra, 210 Cal.App.3d at p. 1102, fn. 3; Thorning v. Hollister School Dist. (1992) 11 Cal.App.4th 1598, 1606.)

Found on Page 25 of the Orange County Sheriff's Opinion.

The pension rights of AOCDS members employed on June 28, 2002 vested when they accepted public employment. (*Miller, supra*, 18 Cal.3d at p. 817.) The vested rights are not immutable. (*Id.* at p. 816.) The County may make reasonable changes to a pension plan before the pension becomes payable, ***so long as***

As detailed in our previous communications, the City may not legally impose changes to the constitutionally protected rights of our members (e.g. sick leave takeaway, pension), nor may it legally impose the City's "side letters" regarding our pensions and other retirement benefits that are in conflict with collective bargaining laws and which attempt to require ALP to agree on issues that are outside the scope of bargaining. ALP has been very clear with the City's negotiating team on the above legal limitations, and it is more than disappointing to see the same provisions from the City again.

This has been a long and very unsatisfactory process, replete with violations by the City of good faith negotiation requirements of the law. While the City correctly states that its negotiators have been in meetings with ALP many times, that does not tell the full story – the City Manager and the Office of Employee Relations are not accurately informing the City Council and the public when they imply that the City was actively negotiating the terms of a collective bargaining agreement with ALP in every one of those meetings. Attachment A provides a summary of the ALP negotiation sessions.

During this process, the City Manager and her Office of Employee Relations have incorrectly informed the City Council and the public that ALP has *not* been willing to make the 5% "ongoing" concessions requested by the City.² In fact, ALP's April 14 proposal B not only provided the City with the full 10% savings that the City requested, but ALP's proposal B contained the *same terms that the City ultimately gave to Unit 99* – the City's unrepresented management employees – the unit from which ALP was formed. In fact, the City negotiating team was in such a rush to reject ALP's proposal B that they declared impasse in its April 15 letter to ALP **before** presenting ALP's proposal to City Council at the closed session on April 19. This rejection of ALP's proposal B unfairly treats ALP differently than employees in Unit 99 and appears to be a retaliatory action against ALP.

Furthermore, City negotiators recommended publicly that the Council enter into a tentative agreement with another bargaining unit, OE3.³ However, the proposed tentative agreement with OE3 does not include the sick leave payout takeaway. Nor

any disadvantages to the employees are accompanied by comparable new advantages. (Ibid.) **The AOCDS members' contractual pension expectations include not only those benefits in effect when they accepted employment, but also those conferred during their tenure.** (Betts v. Board of Administration, *supra*, 21 Cal.3d at p. 866.)

² Last year ALP was the first employee group to agree to a 10% reduction in compensation. ALP agreed that 5% of the reduction would be ongoing and that the other 5% would be taken as furloughs. Pursuant to the City Council's request this year, ALP has agreed to make the second 5% reduction as a base pay reduction, resulting in an "ongoing" reduction of 10%, as defined by the City. Importantly, combined with the other benefit changes agreed to by ALP, the actual reduction in compensation for ALP members – and, more importantly, the actual savings to the City from ALP members – is significantly higher than 10%.

³ The OE3 tentative agreement also appears to allow for the continuation of automatic step increases, albeit at a lower rate, reducing the step increases from approximately 5% to approximately 2.5%. The tentative agreement contains this provision and does not contain any freeze on implementation of the step increases. Thus, the reduction in compensation for OE3 members will be offset by step increases. This is not true of ALP members – who have not been entitled to step increases. OE3 membership did not ratify the proposed tentative agreement negotiated by its representatives with the City bargaining team.

does it include the unreasonable side letters which the City has insisted upon and which ALP has continually objected to.

On May 2, the City Manager issued a public memo with proposed changes to City employee pension system. Then, after the City declared impasse with ALP, the Mayor and three other council members announced their own pension proposals on May 13 in the form of a proposed ballot measure, adding an apparent (but undisclosed) tactic of a declaration of fiscal state of emergency in order to bypass bargaining to unlawfully take away retirement rights from City employees. Neither of these proposals was ever negotiated with ALP. The City's tactics reveal bad faith bargaining in that the City has refused to make proposals on the issues that are subject of the proposed side letters while attempting to obtain economic pay concessions.

The City appears to have purposely failed to disclose and negotiate the complete volume of the City's intended proposals with its employees. Rather, the City continues to layer significant new reduction upon reduction to employee compensation and benefits after it issues declarations of impasse and, as it appears, the City will continue to do so even after reaching tentative agreements or forcing unilateral imposition of terms of employment on its represented employees. City employees are entitled to full disclosure from the City in order to effectively negotiate the full impact of all City proposals. Rather, we are all being asked to agree to piecemeal proposals by the City with no full revelation of the City's scheme.

ALP strongly endorses and supports Councilmember Rocha's memo, which responds to the Mayor's announcement by requesting that the City defer any election on the Mayor's proposal until the City has fully informed the public about the underlying effects and the serious constitutional issues with the Mayor's proposals.

Nevertheless, ALP is willing to offer a proposed agreement. If the City accepts ALP's Offer, ALP will enter into a Tentative Agreement in the form of the attached.

Very truly yours,


WILLIAM CLARK
President
ASSOCIATION OF LEGAL PROFESSIONALS

c: Mayor and City Council
City Attorney
City Clerk
Gary Messing, Esq.

**PROPOSED TENTATIVE AGREEMENT
BETWEEN THE ASSOCIATION OF LEGAL PROFESSIONALS
AND THE CITY OF SAN JOSE**

TERM

July 1, 2011 – June 30, 2012

WAGES

See Attached

VACATION SELLBACK

See Attached

DISABILITY LEAVE SUPPLEMENT

See Attached

LAYOFF RIGHTS AND PROCEDURES

See Attached

TRANSIT SUBSIDY

See Attached

PROPOSED TENTATIVE AGREEMENT
BETWEEN THE ASSOCIATION OF LEGAL PROFESSIONALS
AND THE CITY OF SAN JOSE, Continued

ALP PROPOSAL – WAGES

All employees will receive a 4.39% base pay reduction.

This will replace the 1.90% base pay reduction and twelve mandatory furlough days that became effective June 27, 2011

ALP PROPOSAL - VACATION SELLBACK

Effective December 25, 2011, reduce vacation sellback eligibility from a maximum of 120 hours to a maximum of 60 hours. Employees must submit an irrevocable election form to Payroll on or before November 26, 2011, to be eligible to sell back accrued vacation in 2012.

Effective the first pay period of payroll calendar year 2013, the vacation sellback program will be eliminated and no employees will be eligible to sell back any accrued vacation hours.

ALP PROPOSAL - DISABILITY LEAVE SUPPLEMENT

Effective June 26, 2011, reduce the maximum disability supplemental pay benefit from six (6) calendar months to three (3) calendar months (520 hours).

Effective June 24, 2012, disability leave supplement will be eliminated.

TRANSIT SUBSIDY

ECO-Pass

After calendar year 2011, the City will no longer provide employees an ECO-Pass. This means that any employee in possession of a 2011 ECO-Pass provided by the City may continue its use through calendar year 2011. Beginning calendar year 2012, the City will cease providing an ECO-Pass.

Commuter Check Program

Upon exhaustion of the current supply of Commuter Check Vouchers, the Vouchers will no longer be available to employees for purchase from the City. This means that the subsidized Commuter Check Voucher program is eliminated after the current supply of Commuter Check Vouchers are exhausted.

PROPOSED TENTATIVE AGREEMENT
BETWEEN THE ASSOCIATION OF LEGAL PROFESSIONALS
AND THE CITY OF SAN JOSE, Continued

The terms and conditions contained in this Tentative Agreement represent the full, complete and entire understanding of the parties regarding the matters set forth herein. Employees represented by ALP shall receive all of the benefits received by Unit 99 on June 15, 2010, as modified by the June 15, 2010 tentative agreement between the City and ALP, unless explicitly modified by this Tentative Agreement.

It is understood that neither party may require the other party to meet and confer over any subject covered by this Tentative Agreement except as provided herein. Notwithstanding the foregoing, each party agrees to meet and confer with the other over the following issues, which cannot result in a retroactive application of changes, within ten (10) days of written notice from the other party:

1. Supplemental Retirement Benefit Reserve program.
2. Retirement Reform including:
 - a. pension and retiree healthcare benefits for future employees
 - b. pension and retiree healthcare benefits for current employees to the extent that the benefits fall within the scope of representation.
3. Layoff impact related processes

ALP's agreement to bargain shall not be considered a waiver, reduction or modification of vested rights to benefits. Likewise, the City is not waiving any rights it may have under the MMBA. Nothing in this section is intended to expand City's rights under the MMBA or to diminish ALP's rights under the federal or state constitution or under the MMBA.

WILLIAM CLARK
President
ASSOCIATION OF LEGAL PROFESSIONALS

Attachment 1
ALP Negotiation Process Summary

The City's first meeting with ALP was January 24, 2011. No substantive negotiations occurred at this meeting, nor for several following meetings. Instead the early meetings centered upon the City's demand that ALP agree to a set of one sided "ground rules" that ALP found to be unreasonable. In fact it is our understanding that no bargaining unit ultimately agreed to the City's ground rules. After the City spent approximately a month insisting that these ground rules were essential, the City's negotiating team suddenly reversed course, refused to discuss ground rules further, and proceeded with negotiation meetings without ground rules.

One might expect the City to quickly move on to deliver comprehensive proposals— after all the City had issued an audit in September 2010 and City Council had conducted a number of meetings regarding topics related to the upcoming negotiations at various times during the fall 2010 and early January.⁴

Instead, it was not until early March when the City started to submit proposals in the form of isolated contract provisions, subdividing the negotiations into piecemealed segments. Examples of these isolated contract provision proposals may be seen on the ALP section of the City's labor negotiations website.

It was not until March 11 that the City made its first "package" proposal A, which was still an incomplete proposal. The City's package proposal did not include retirement proposals but included "sideletters" which deferred to the future, negotiations on several of the most important negotiation topics—in particular it deferred negotiations on the City's ideas regarding the retirement system. Over the 2-½ months since then, the City has not supplemented the incomplete "package" with proposals on the pension system or other other retirement benefits, nor has the City been willing to change it proposals to ALP in any material way.

The City's negotiation team of Charles Sakai and Gina Donnelly, have generally been willing to enter into discussions during ALP's attempts to more fully understand the underlying facts of the City's budget crisis. The negotiators have at times been willing to spend time with ALP representatives to discuss new and creative ideas to address the budget crisis. However, when those representatives return after consultation with their "principals" either to bring the City's official proposals or to inform ALP of the City's official position on a proposal or other idea, the official City response has always been rigid, inflexible, and basically unchanging. Meanwhile, while the City and ALP were meeting in these negotiation sessions, the City Manager, other members of Office of Employee Relations and the Mayor and City Council were leading public lectures and meetings,

⁴ Included in these actions, on January 25, 2011 in an action promoted by the Mayor, City Council revised Policy 0-39 to become an effective "gag" order – prohibiting employees and City Council members from discussing anything that even remotely relates to "labor negotiations" attempting to stifle the voice of the bargaining units to the "negotiating table".

repeatedly discussing a variety of proposed changes to City employee pension rights with the public without bringing these proposals to the negotiation sessions. The City engaged in this behavior repeatedly and had these discussions only in a venue where the City's newly adopted provisions of Policy 0-39 prohibit the City's bargaining units from participating on an equal basis with the City's negotiating team in expressing their views on these topics. In these meetings, the City negotiation team, the Mayor and City Council members could openly lobby the public for changes to the pension rights of City employees, without actually negotiating with ALP. Furthermore, the public was never told in these public meetings, that many of the proposals were unconstitutional, and would violate the rights of City employees. The City has failed to inform the public that many bargaining units including ALP had already agreed to the 10% reduction demanded by the City Council, and that many of the City's proposals to mimic actions taken by Orange County, which were found to be illegal by the California courts, costing Orange County taxpayers over a million dollars in legal fees and will likely cost that public agency far more when the dust finally settles.

Even now, after five months of meetings with ALP and after numerous public meetings outside of the bargaining table, the City has not made one proposal to ALP over pension or retirement reform.